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Edward McCain

Mon, Jan 29, 2007 11:55 AM

Subject: Re: Edward McCain Nominated for Arizona Arts Award

Date: Monday, May 2, 2005 4:08 PM

From: Mark Borchetta <mark@borchetta.com>

To: Edward McCain <edward@mccainphoto.com>

Conversation: Edward McCain Nominated for Arizona Arts Award

Yeah, and she was second fastest qualifier and passed twice for the lead! I'm trying to land another deal for her, I'd love to have you shoot some more stuff if we get it. Those photos are sill the best she has!

From: Edward McCain <edward@mccainphoto.com>

Date: Mon, 02 May 2005 16:04:08 -0700

To: Mark Borchetta <mark@borchetta.com>

Subject: Re: Edward McCain Nominated for Arizona Arts Award

I see she took fourth in the Japan 300 – damn! I hope she kicks ass at Indy...

On 5/2/05 2:40 PM, "Mark Borchetta" <mark@borchetta.com> wrote:

Sure. Take note of Danica this month.... She's going to be huge at Indy~

Edward McCain

Assignment & Stock Photography

Voice: (520) 623-1998 Fax: (520) 623-1190

mailto:edward@mccainphoto.com

Assignments:

<http://www.mccainphoto.com>

Stock:

<http://www.photosofarizona.com>

"Life is an affirmative action program"

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Edward McCain

Mon, Jan 29, 2007 11:56 AM

Subject: Re: Edward McCain Nominated for Arizona Arts Award

Date: Monday, May 2, 2005 4:21 PM

From: Mark Borchetta <mark@borchetta.com>

To: Edward McCain <edward@mccainphoto.com>

Conversation: Edward McCain Nominated for Arizona Arts Award

Cool. Will hopefully be in touch.

--

From: Edward McCain <edward@mccainphoto.com>

Date: Mon, 02 May 2005 16:17:13 -0700

To: Mark Borchetta <mark@borchetta.com>

Subject: Re: Edward McCain Nominated for Arizona Arts Award

Mark,

You wouldn't have to twist my arm. Let me know how it goes and if you need any help putting together your proposal – you can use some of my photos if you need to. It would be such a blast to work with you again!

Thanks,

Edward

On 5/2/05 4:08 PM, "Mark Borchetta" <mark@borchetta.com> wrote:

Yeah, and she was second fastest qualifier and passed twice for the lead! I'm trying to land another deal for her, I'd love to have you shoot some more stuff if we get it. Those photos are still the best she has!

Edward McCain

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Edward McCain

Mon, Jan 29, 2007 11:59 AM

Subject: Re: Danica Images

Date: Thursday, June 2, 2005 7:50 PM

From: Mark Borchetta <mark@borchetta.com>

To: Edward McCain <edward@mccainphoto.com>

Conversation: Danica Images

They could've gotten several photos from Argent or us – but if from us, it would have been at the request of Argent for Rahal's approval for use in an Argent ad, as Rahal has approval on everything. Knowing Rahal's organization though, I would guess that they would have gotten the OK from Argent to use any photo. That's again only a guess.

Argent's contact would've been Johanna Padberg, who is no longer there. Hope, with whom I believe you spoke regarding the SI/Maxim deal, would probably be the person who communicates with Rahal Letterman Racing now. I'm not sure with whom she would communicate about PR stuff.

--
Mark Borchetta
Borchetta Marketing Group
15260 Ventura Blvd, Suite 840
Sherman Oaks, CA 91403
Phone 818/990-3239
www.borchetta.com

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From: Edward McCain <edward@mccainphoto.com>

Date: Thu, 02 Jun 2005 15:26:55 -0700

To: Mark Borchetta <mark@borchetta.com>

Exhibit H Page 151 Page 1 of 3

Edward McCain

Mon, Jan 29, 2007 12:02 PM

Subject: Re: Card Question

Date: Monday, June 13, 2005 5:43 PM

From: Mark Borchetta <mark@borchetta.com>

To: Edward McCain <edward@mccainphoto.com>

Conversation: Card Question

I thought I had responded to this... The design style looks like something that would have been produced by Argent or one of their other agencies.

--
Mark Borchetta
Borchetta Marketing Group
15260 Ventura Blvd, Suite 840
Sherman Oaks, CA 91403
Phone 818/990-3239
www.borchetta.com

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From: Edward McCain <edward@mccainphoto.com>
Date: Mon, 13 Jun 2005 08:57:40 -0700
To: Mark Borchetta <mark@borchetta.com>
Subject: Card Question

Mark,

Do you know who produced this card for Argent in 2003 (apparently)?

Hope you had a good weekend.

Edward

Edward McCain

Assignment & Stock Photography

Voice: (520) 623-1998 Fax: (520) 623-1190

mailto:edward@mccainphoto.com

Assignments:

<http://www.mccainphoto.com>

Stock:

<http://www.photosofarizona.com>

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To: <RArther@argentmortgage.com>
cc:
Subject: Re: Urgent Danica photo

Not that I possess.

--
Mark Borchetta
Borchetta Marketing Group
15260 Ventura Blvd
Suite 840
Sherman Oaks, CA 91403
Phone 818/990-3239
Fax 818/990-6079
mark@borchetta.com

From: RArther@argentmortgage.com
Date: Wed, 19 Jan 2005 14:10:49 -0800
To: mark@borchetta.com, brian@borchetta.com
Cc: HMargarit@argentmortgage.com
Subject: Urgent Danica photo

Mark

Are there any similar photos of Danica that we don't have to pay licensing fees on that we own out right?

Thank you

Rochelle Arther
Advertising Coordinator, Marketing
Argent Mortgage
3 Park Plaza
Irvine, CA 92614
(800) 561-4072 Ext. 84175

From: Mark Borchetta <mark@borchetta.com>
Date: Wed, 19 Jan 2005 14:20:23 -0700
To: <RArther@argentmortgage.com>
Subject: Re: Urgent Danica photo

By the way, it is the photographer that owns the licensing, not BMG.

--
Mark Borchetta
Borchetta Marketing Group
15260 Ventura Blvd
Suite 840
Sherman Oaks, CA 91403
Phone 818/990-3239
Fax 818/990-6079
mark@borchetta.com

From: RArther@argentmortgage.com
Date: Wed, 19 Jan 2005 14:15:29 -0800
To: Mark Borchetta <mark@borchetta.com>
Subject: Re: Urgent Danica photo

We used the leather shots all throughout 2003 under Johanna's contract. So did we have to pay fees on those or did the contract just run out?

Thank you

Rochelle Arther
Advertising Coordinator, Marketing
Argent Mortgage
3 Park Plaza
Irvine, CA 92614
(800) 561-4072 Ext. 84175
Fax (800) 551-2614

Edward McCain

Mon, Jan 29, 2007 12:01 PM

Subject: Re: Danica

Date: Wednesday, June 8, 2005 2:10 PM

From: Mark Borchetta <mark@borchetta.com>

To: Edward McCain <edward@mccainphoto.com>

Conversation: Danica

No, I did not do this piece. Looks like an Argent internal design. The agency that did their newsletter used that design style.

--

Mark Borchetta
Borchetta Marketing Group
15260 Ventura Blvd, Suite 840
Sherman Oaks, CA 91403
Phone 818/990-3239
www.borchetta.com

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From: Edward McCain <edward@mccainphoto.com>
Date: Wed, 08 Jun 2005 13:17:45 -0700
To: Mark Borchetta <mark@borchetta.com>
Subject: Danica

Mark,

Exhibit H Page 156

Page 1 of 2

Was this piece one of the ones you did for Argent under our agreement?

The letters will go out by the end of the week. That's about all I know now.

Thanks,

Edward

Edward McCain

Assignment & Stock Photography

Voice: (520) 623-1998 Fax: (520) 623-1190

mailto:edward@mccainphoto.com

Assignments:

<http://www.mccainphoto.com>

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Edward McCain

Mon, Jan 29, 2007 12:01 PM

Subject: Re: Danica**Date:** Wednesday, June 8, 2005 3:01 PM**From:** Mark Borchetta <mark@borchetta.com>**To:** Edward McCain <edward@mccainphoto.com>**Conversation:** Danica

I couldn't say when it was created. The CDL (my company) created most everything for them, but not all. They had an agency in the mid-west who did a few things for them, such as their newsletter, etc. I would guess that card is a B2B hero card for a tradeshow or internal sales meeting, or something like that.

Mark Borchetta
Borchetta Marketing Group
15260 Ventura Blvd, Suite 840
Sherman Oaks, CA 91403
Phone 818/990-3239
www.borchetta.com

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From: Edward McCain <edward@mccainphoto.com>**Date:** Wed, 08 Jun 2005 14:49:20 -0700**To:** Mark Borchetta <mark@borchetta.com>**Subject:** Re: Danica

Edward McCain

Mon, Jan 29, 2007 12:02 PM

Subject: Re: Danica

Date: Wednesday, June 8, 2005 3:02 PM

From: Mark Borchetta <mark@borchetta.com>

To: Edward McCain <edward@mccainphoto.com>

Conversation: Danica

The guy you got it from on Ebay (if that's where you got it) could be a broker selling something she signed for him at an Argent event.

Is that legal for a person to do?

Mark Borchetta
Borchetta Marketing Group
15260 Ventura Blvd, Suite 840
Sherman Oaks, CA 91403
Phone 818/990-3239
www.borchetta.com

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From: Edward McCain <edward@mccainphoto.com>

Date: Wed, 08 Jun 2005 14:49:20 -0700

To: Mark Borchetta <mark@borchetta.com>

Subject: Re: Danica

Does that mean they probably created the piece after the one-year agreement had expired? Did you do all this kind of work for them that year?

On 6/8/05 2:10 PM, "Mark Borchetta" <mark@borchetta.com> wrote:

No, I did not do this piece. Looks like an Argent internal design. The agency that did their newsletter used that design style.

Edward McCain

Assignment & Stock Photography

Voice: (520) 623-1998 Fax: (520) 623-1190

mailto:edward@mccainphoto.com

Assignments:

<http://www.mccainphoto.com>

Stock:

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Edward McCain

Mon, Jan 29, 2007 1:13 PM

Subject: Danica images usage

Date: Wednesday, August 16, 2006 11:56 AM

From: Mark Borchetta <mark@borchetta.com>

To: Ed McCain <edward@mccainphoto.com>

Cc: David Cohen <dcohen@linerlaw.com>, <jpelosi@pwes.com>

Conversation: Danica images usage

Category: Advertising/Design

Hi Ed,

I'm just emailing to confirm that we had previously spoken about The Creative Department dba Borchetta Marketing Group having permission to display the Danica Patrick images you shot in 2003 at Firebird Raceway for use on the borchetta.com website and to be able to show to potential clients as marketing materials for Borchetta Marketing Group.

The photos were not and are not to be used for any other purpose by Borchetta Marketing Group.

There was no charge for such and Borchetta Marketing agreed not to use the photos for any other purpose whatsoever.

Please make sure I was in correct understanding of our discussion.

Thanks.

--

Mark Borchetta

25020 Avenue Stanford
Suite 100
Valencia, CA
25020 Avenue Stanford, Suite 100
Valencia, CA 91355
Phone 661-977-7464
Fax 661-702-1844
www.borchetta.com

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Exhibit H Page 161

Page 1 of 1

Edward McCain

Mon, Jan 29, 2007 1:14 PM

Subject: Re: Danica images usage**Date:** Wednesday, August 16, 2006 12:30 PM**From:** Mark Borchetta <mark@borchetta.com>**To:** Ed McCain <edward@mccainphoto.com>**Conversation:** Danica images usage**Category:** Advertising/Design

Thanks for the confirmation Ed.

--

Mark Borchetta

25020 Avenue Stanford
 Suite 100
 Valencia, CA
 25020 Avenue Stanford, Suite 100
 Valencia, CA 91355
 Phone 661-977-7464
 Fax 661-702-1844
 www.borchetta.com

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```

> From: Edward McCain <edward@mccainphoto.com>
> Date: Wed, 16 Aug 2006 12:27:38 -0700
> To: Mark Borchetta <mark@borchetta.com>
> Conversation: Danica images usage
> Subject: Re: Danica images usage
>
> Mark,
>
> I granted you the right to reproduce the images on your website. Your use
> is legal and with my full permission as copyright holder of the
> Photographs.
>
> Edward
>
>
> On 8/16/06 11:56 AM, "Mark Borchetta" <mark@borchetta.com> wrote:
>
>> Hi Ed,
>>
>> I'm just emailing to confirm that we had previously spoken about The
>> Creative Department dba Borchetta Marketing Group having permission to
>> display the Danica Patrick images you shot in 2003 at Firebird Raceway for
  
```

Exhibit H Page 162 Page 1 of 2

>> use on the borchetta.com website and to be able to show to potential clients
>> as marketing materials for Borchetta Marketing Group.
>>
>> The photos were not and are not to be used for any other purpose by
>> Borchetta Marketing Group.
>>
>> There was no charge for such and Borchetta Marketing agreed not to use the
>> photos for any other purpose whatsoever.
>>
>> Please make sure I was in correct understanding of our discussion.
>>
>> Thanks.
>>
>>
>
> *****
> Edward McCain
> Assignment & Stock Photography
> Voice: (520) 623-1998 Fax: (520) 623-1190
> mailto:edward@mccainphoto.com
> Assignments:
> <http://www.mccainphoto.com>
> Stock:
> <http://www.photosofarizona.com>
> "Life is an affirmative action program"
> *****
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>
>

Exhibit "I"

1 PELOSI WOLF EFFRON & SPATES LLP
 2 JOHN PELOSI (*Admitted Pro Hac Vice*)
 233 Broadway, 22nd Floor
 New York, NY 10279
 3 Telephone: (212) 334-3599
 Facsimile: (212) 571-9149
 4 Email: jpelosi@pwes.com
 Attorneys for Defendant/Counterclaim Plaintiff
 5 EDWARD MCCAIN



6 **UNITED STATES DISTRICT COURT**
 7 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**
 8 ARGENT MORTGAGE COMPANY, LLC, a California limited liability company; and TEAM RAHAL, INC., an Ohio Corporation, Plaintiffs,
 9 v.
 10 EDWARD McCAIN, an individual, Defendant.
 11
 12
 13
 14 **AND RELATED COUNTERCLAIMS**

} Case No. SACV 06-749 CJC (RNBx)
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DEFENDANT'S ANSWERS TO PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSIONS

Judge: Hon. Cormac J. Carney
 Crtrm: 9B

ANSWERS TO SECOND SET OF REQUESTS FOR ADMISSIONS

ANSWER TO REQUEST FOR ADMISSION NO. 28:

Admit that Argent entered into the 2002 License Agreement and that the agreement was transmitted to Argent through Borchetta. The 2002 License Agreement reflects the terms offered to and accepted by Argent.

ANSWER TO REQUEST FOR ADMISSION NO. 29:

Admit that Argent entered into the 2005 License Agreement and that the agreement was transmitted to Argent through Borchetta. The 2005 License Agreement reflects the terms offered to and accepted by Argent.

ANSWER TO REQUEST FOR ADMISSION NO. 30:

Admit, to the extent that the signature appears to be Borchetta's.

ANSWER TO REQUEST FOR ADMISSION NO. 31:

Admit, to the extent that the signature appears to be Borchetta's.

1 **ANSWER TO REQUEST FOR ADMISSION NO. 32:**

2 Deny.

3 **ANSWER TO REQUEST FOR ADMISSION NO. 33:**

4 Admit, to the extent that the Photographs were provided to Borchetta who, in turn, provided
5 them to Argent.

6 **ANSWER TO REQUEST FOR ADMISSION NO. 34:**

7 Admit.

8 **ANSWER TO REQUEST FOR ADMISSION NO 35:**

9 Deny. The restrictions are in the 2002 License Agreement, the terms of which were
10 accepted by Argent. Upon information and belief, Argent was made aware of the
11 restrictions in the 2002 License Agreement by Borchetta and Argent was notified by letter
12 dated August 23, 2005 of Argent's infringements.

13 **ANSWER TO REQUEST FOR ADMISSION NO 36:**

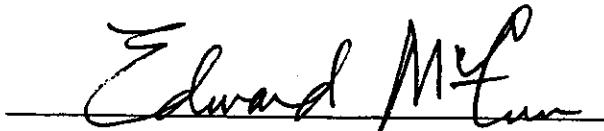
14 Deny, to the extent the admission requested is unclear.

15

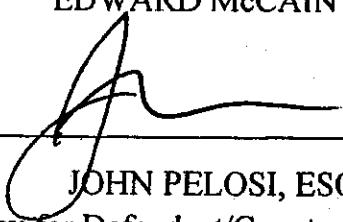
16 DATED: June 29, 2007

17 **DECLARATION**

18 Edward McCain declares under penalty of perjury that he is the Defendant and Counterclaim
19 Plaintiff in this action, that he has read the foregoing Answers to Plaintiff's Second Set of
20 Admissions dated May 30, 2007, and that they are true to his own knowledge, except as to
21 matters stated upon information and belief, as to which matters he believes to be true.

22 
23

24 EDWARD McCAIN
25

26 By: 

27 JOHN PELOSI, ESQ.
28 Attorney for Defendant/Counterclaim Plaintiff
Edward McCain

PROOF OF SERVICE

I am a citizen of the United States. My business address is 233 Broadway, 22nd Floor, New York, NY 10279. I am employed in the County of New York, where this service occurs. I am over the age of 18 years, and I am not a party to the within cause. I am readily familiar with my firm's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business.

On the day set forth below, following ordinary business practice, I served a copy of the foregoing documents described as:

DEFENDANT'S ANSWERS TO PLAINTIFF'S SECOND SET OF ADMISSIONS

By Mail: I caused such envelopes with postage thereon fully prepaid to be placed in the United States mail, to the addressees (attorneys for Plaintiffs), on this date before 5:00 p.m.:

Richard P. Ormond, Esq.
BUCHALTER NEMER
1000 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90017-2457

H. Ritchey Hollenbaugh, Esq.
Carlile, Patchen & Murphy LLP
366 East Broad Street
Columbus, OH 43215

David J. Pasternak, Esq.
Pasternak, Pasternak & Patton
1875 Century Park East, Suite 2200
Los Angeles, CA 90067-2523

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 29, 2007, at New York, New York.

Angelo DiStefano

Exhibit "J"

1 PELOSI WOLF EFFRON & SPATES LLP
 2 JOHN PELOSI (*Admitted Pro Hac Vice*)
 233 Broadway, 22nd Floor
 New York, NY 10279
 3 Telephone: (212) 334-3599
 Facsimile: (212) 571-9149
 4 Email jpelosi@pwes.com

5 THE LAW OFFICES OF LARRY S. GREENFIELD
 Larry S. Greenfield (SBN: 093917)
 6 433 N. Camden Drive, Suite 400
 Beverly Hills, CA 90210-4408
 7 Telephone: (310) 279-5210
 Facsimile: (310) 362-8413
 8 Email: larrysgreenfield@gmail.com

9 Attorneys for Defendant
 10 EDWARD MCCAIN

11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

13 ARGENT MORTGAGE COMPANY, LLC, a California limited liability
 14 company; and TEAM RAHAL, INC., an Ohio Corporation,

16 Plaintiffs,

17 v.

18 EDWARD McCAIN, an individual,

19 Defendant.

Case No. SACV 06-749 CJC (RNBx)
**NOTICE OF VOLUNTARY
 DISMISSAL OF CLAIMS AGAINST
 RAHAL LETTERMAN RACING,
 LLC PURSUANT TO F.R.C.P.
 RULE 41 (a)**

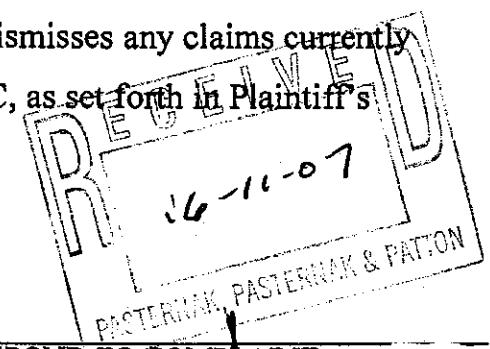
Judge: Hon. Cormac J. Carney
 Crtrm: 9B

21 AND RELATED COUNTERCLAIMS

23 Defendant and Counterclaimant, EDWARD McCAIN, pursuant to Federal
 24 Rule of Civil Procedure 41(a), hereby voluntarily dismisses any claims currently
 25 pending in this Court against Rahal Letterman, LLC, as set forth in Plaintiff's
 26 Answer and Counterclaims.

27
 28 STIPULATION TO EXTEND TIME TO RESPOND TO COMPLAINT

Exhibit 167 Page 167



1 Rahal Letterman Racing, LLC was not a named Plaintiff in the Complaint.
2 Edward McCain named Rahal Letterman Racing, LLC as a party in its Answer to
3 Complaint and Counterclaims. Edward McCain never served Rahal Letterman
4 Racing, LLC with its Answer to Complaint and Counterclaims. Rahal Letterman
5 Racing, LLC never answered Edward McCain's Counterclaims.

6

7

Dated: June 8, 2007

8

9

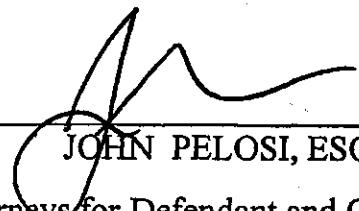
PELOSI WOLF EFFRON & SPATES LLP

10

11

By: _____

12

 JOHN PELOSI, ESQ.

13

Attorneys for Defendant and Counterclaimant
EDWARD McCAIN

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²
NOTICE OF VOLUNTARY DISMISSAL OF CLAIMS PURSUANT TO F.R.C.P. RULE 41(a)

PROOF OF SERVICE

I am a citizen of the United States. My business address is 233 Broadway, 22nd Floor, New York, NY 10279. I am employed in the County of New York, where this service occurs. I am over the age of 18 years, and I am not a party to the within cause. I am readily familiar with my firm's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business.

On the day set forth below, following ordinary business practice, I served a copy of the foregoing documents described as:

By Mail: I caused such envelopes with postage thereon fully prepaid to be placed in the mail courier service, Federal Express, to the addressee on this date:

Richard P. Ormond, Esq.
BUCHALTER NEMER
1000 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90017-2457

H. Ritchey Hollenbaugh, Esq.
Carlile, Patchen & Murphy LLP
366 East Broad Street
Columbus, OH 43215

David J. Pasternak, Esq.
Pasternak, Pasternak & Patton
1875 Century Park East, Suite 2200
Los Angeles, CA 90067-2523

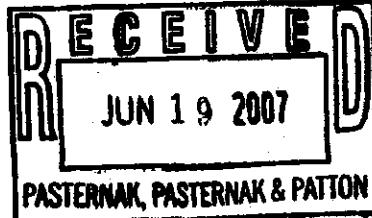
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 8, 2007, at New York, New York.


Angelo DiStefano

Exhibit "K"

1 PELOSI WOLF EFFRON & SPATES LLP
2 JOHN PELOSI (*Admitted Pro Hac Vice*)
3 233 Broadway, 22nd Floor
4 New York, NY 10279
5 Telephone: (212) 334-3599
6 Facsimile: (212) 571-9149
7 Email jpelosi@pwes.com



8 THE LAW OFFICES OF LARRY S. GREENFIELD
9 Larry S. Greenfield (SBN: 093917)
10 433 N. Camden Drive, Suite 400
11 Beverly Hills, CA 90210-4408
12 Telephone: (310) 279-5210
13 Facsimile: (310) 362-8413
14 Email: larrysgreenfield@gmail.com

15 Attorneys for Defendant
16 EDWARD MCCAIN

17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

19 ARGENT MORTGAGE COMPANY,
20 LLC, a California limited liability
21 company; and TEAM RAHAL, INC.,
22 an Ohio Corporation,

23 Plaintiffs,

24 v.

25 EDWARD McCAIN, an individual,

26 Defendant.

27 } Case No. SACV 06-749 CJC (RNBx)
28 } **NOTICE OF VOLUNTARY
AND RELATED COUNTERCLAIMS
DISMISSAL OF CLAIMS AGAINST
RAHAL LETTERMAN RACING,
INC. PURSUANT TO F.R.C.P.
RULE 41 (a)**

29 }
30 } **Judge: Hon. Cormac J. Carney
Crtrm: 9B**

31 }
32 } **AND RELATED COUNTERCLAIMS**

33 }
34 } Defendant and Counterclaimant, EDWARD MCCAIN, pursuant to Federal
35 } Rule of Civil Procedure 41(a), hereby voluntarily dismisses any claims currently
36 } pending in this Court against Rahal Letterman Racing, Inc., as set forth in Plaintiff's
37 } Answer and Counterclaims.

1 Rahal Letterman Racing, Inc. was not a named Plaintiff in the Complaint.
2 Edward McCain named Rahal Letterman Racing, Inc. as a party in its Answer to
3 Complaint and Counterclaims. Edward McCain never served Rahal Letterman
4 Racing, Inc. with its Answer to Complaint and Counterclaims. Rahal Letterman
5 Racing, Inc. never answered Edward McCain's Counterclaims.

6

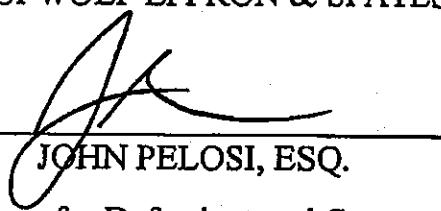
7 Dated: June 14, 2007

8

9

10 PELOSI WOLF EFFRON & SPATES LLP

11

12 By: 

13 JOHN PELOSI, ESQ.

14

15 Attorneys for Defendant and Counterclaimant
16 EDWARD McCAIN

17

18

19

20

21

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27

28

2 NOTICE OF VOLUNTARY DISMISSAL OF CLAIMS PURSUANT TO F.R.C.P. RULE 41(a)

Exhibit K Page 171

PROOF OF SERVICE

I am a citizen of the United States. My business address is 233 Broadway, 22nd Floor, New York, NY 10279. I am employed in the County of New York, where this service occurs. I am over the age of 18 years, and I am not a party to the within cause. I am readily familiar with my firm's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business.

On the day set forth below, following ordinary business practice, I served a copy of the foregoing documents described as:

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Los Angeles, CA 90017-2457

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366 East Broad Street
Columbus, OH 43215

David J. Pasternak, Esq.
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1875 Century Park East, Suite 2200
Los Angeles, CA 90067-2523

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 14, 2007, at New York, New York.


Angelo DiStefano

Exhibit "L"

1 BUCHALTER NEMER
 2 A Professional Corporation
 3 MICHAEL L. WACHTELL (SBN: 47218)
 4 RICHARD P. ORMOND (SBN: 207442)
 5 1000 Wilshire Boulevard, Suite 1500
 6 Los Angeles, CA 90017-2457
 7 Telephone: (213) 891-0700
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 9 E-mail: mwachtell@buchalter.com
 10 E-mail: rormond@buchalter.com

11 Attorneys for Plaintiff and Counterclaim Defendant
 12 ARGENT MORTGAGE COMPANY, LLC

13 **UNITED STATES DISTRICT COURT**
 14 **CENTRAL DISTRICT OF CALIFORNIA**

15 ARGENT MORTGAGE
 16 COMPANY, LLC, a California
 17 limited liability company; and
 18 TEAM RAHAL, INC., an Ohio
 19 Corporation,

20 Plaintiffs,

21 vs.

22 EDWARD MCCAIN, an individual;
 23 MARK BORCHETTA, an individual
 24 dba BORCHETTA MARKETING
 25 GROUP and dba BORCHETTA
 26 GROUP; BORCHETTA,
 27 WENTWORTH & ASSOCIATES, a
 28 business entity of unknown origin;
 BORCHETTA & WENTWORTH
 ADVERTISING, a business entity of
 unknown origin; BORCHETTA
 ARTS & PRODUCTIONS, a
 business entity of unknown origin;
 and THE CREATIVE
 DEPARTMENT, LLC, a California
 limited liability company, dba
 BORCHETTA MARKETING
 GROUP,

29 Defendants.

30 Case No. SACV 06-749 CJC (RNBx)

- 31 1. **ARGENT MORTGAGE
 32 COMPANY, LLC'S FIRST
 33 AMENDED COMPLAINT AND
 34 DEMAND FOR JURY TRIAL
 35 FOR:**
- 36 2. **DECLARATORY JUDGMENT
 37 OF NON-INFRINGEMENT;**
- 38 3. **DECLARATORY JUDGMENT
 39 FOR NO LIABILITY FOR
 40 ACTS OF THIRD PARTIES;**
- 41 4. **BREACH OF WRITTEN
 42 CONTRACT;**
- 43 5. **BREACH OF FIDUCIARY
 44 DUTY;**
- 45 6. **CONTRACTUAL INDEMNITY;**
- 46 7. **EQUITABLE INDEMNITY;**
- 47 8. **ACCOUNTING;**
- 48 9. **INTENTIONAL
 49 MISREPRESENTATION;**
- 50 10. **INTENTIONAL
 51 CONCEALMENT;**
- 52 11. **INTENTIONAL
 53 CONCEALMENT OF SECRET
 54 PROFITS; and**
- 55 12. **CONSPIRACY.**

1 EDWARD MCCAIN, an individual,
 2 Counterclaim plaintiff,
 3 vs.
 4 TEAM RAHAL, INC., an Ohio
 5 Corporation; RAHAL LETTERMAN
 6 RACING, INC., a California limited
 7 liability company; and ARGENT
 8 MORTGAGE COMPANY, LLC, a
 9 California limited liability company,
 10 Counterclaim defendants.

10 Argent Mortgage Company, LLC ("Argent"), for itself alone, in its First
 11 Amended Complaint alleges as follows:

12 **JURISDICTION AND VENUE**

13 1. This is an action for declaratory judgment of non-infringement of
 14 copyrights registered under United States Registration No. Vau-564-275 and for
 15 related State claims. This action arises under the Federal Declaratory Judgment
 16 Act, 28 U.S.C. §§ 2201 and 2202, and the copyright laws of the United States,
 17 U.S.C. § 101 *et seq.*

18 2. This Court has jurisdiction over this action pursuant to 28 U.S.C.
 19 §§ 1331 and 1338 under a Federal Question and under 28 U.S.C. § 1337(a) for
 20 Argent's additional claims set forth herein as arising from the same case and
 21 controversy as the Federal Question.

22 3. Venue is proper in this Court under 28 U.S.C. § 1331(b) because a
 23 substantial part of the events or omissions giving rise to the infringement claims
 24 and the other acts complained of herein occurred in this judicial district. Further,
 25 the defendants entered into agreements related to the subject matter of the claims
 26 and the copyrights of Registration No. Vau-564-275 in this judicial district and all
 27 of the defendants regularly conduct business in this Federal District.

THE PARTIES

4. Argent is a California limited liability company with its principal place of business in Orange County, California.

5. Defendant **Edward McCain** ("McCain") is a citizen of the United States of America, having a place of business at 211 South 4th Avenue, Tucson, Arizona 85701.

6. Defendant **Mark Borchetta** is a citizen of the United States of America, having his principal place of business in Valencia, California

7. Mark Borchetta has registered various fictitious business names in the County of Los Angeles, including **Borchetta Group** and **Borchetta Marketing Group**.

8. Defendant **Borchetta, Wentworth & Associates** is a California business of unknown form, having a principal place of business in Valencia, California.

9. Defendant **Borchetta & Wentworth Advertising** is a California business of unknown form, having a principal place of business in Valencia, California.

10. Defendant **Borchetta Arts & Productions** is a California business of unknown form, having a principal place of business in Valencia, California

11. Defendant **The Creative Department, LLC**, is a California limited liability company, having a principal place of business in Valencia, California. Defendant The Creative Department, LLC was also doing business as the **Borchetta Marketing Group** at all times mentioned in this Complaint.

12. For ease of reference, Defendants Borchetta Marketing Group; Borchetta, Wentworth & Associates; Borchetta & Wentworth Advertising; Borchetta Arts & Productions; and The Creative Department, L.L.C. are collectively

1 referred to herein as the "Borchetta Entities" and together with Mark Borchetta,
 2 "Borchetta."

3 **THE FICTION OF THE BORCHETTA ENTITIES**

4 13. Throughout the time stated in this Complaint, Mark Borchetta held
 5 himself out to Argent as the principal of the Borchetta Entities and communicated
 6 to Argent as a representative of each of the Borchetta Entities, separately and
 7 collectively.

8 14. There now exists, and at all times material hereto has existed, such a
 9 unity of ownership, interest and control between Mark Borchetta and the Borchetta
 10 Entities so that any individuality or separateness which may have existed between
 11 the Borchetta Entities and Mark Borchetta has ceased or never existed.

12 15. The Borchetta Entities, individually and jointly, are the alter egos of
 13 Mark Borchetta in that Mark Borchetta has completely controlled, dominated,
 14 managed, and operated the Borchetta Entities, and has used those entities as mere
 15 shells or conduits through which to carry on his own business, including engaging
 16 in the acts and/or omissions complained of herein.

17 16. Adherence to the fiction of the separate existence of the Borchetta
 18 Entities and Mark Borchetta would permit an abuse of corporate privilege and
 19 would sanction fraud and promote injustice. Consequently, the Borchetta Entities
 20 and Mark Borchetta should be held jointly and severally liable to Argent for the
 21 acts and omissions complained of herein.

22 **FACTS RELATING TO ARGENT'S DECLARATORY RELIEF CLAIMS**
 23 **FOR NON-INFRINGEMENT**

24 17. Argent, at all relevant times in this Complaint, was one of the fastest-
 25 growing, wholesale mortgage companies in the United States.

1 18. Plaintiff Team Rahal, Inc. ("Team Rahal") is a corporation established
 2 by three-time CART champion Bobby Rahal to manage and operate an Indy Racing
 3 Team.

4 19. Argent entered into a sponsorship agreement with Plaintiff Team
 5 Rahal, which agreement provided that Argent would sponsor certain drivers of
 6 Plaintiff Team Rahal's Indy Racing Team.

7 20. McCain is a photographer who, on or about November 13 and 14,
 8 2002, took still photographs of one of Plaintiff Team Rahal's drivers, Danica
 9 Patrick (the "Photographs").

10 21. McCain registered the copyrights in the Photographs with the United
 11 States Copyright Office under a single registration, which issued under registration
 12 number Vau-564-275 (hereinafter the "Registered Copyright").

13 22. McCain has informed Argent that Argent's use of certain Photographs
 14 purportedly infringe McCain's Registered Copyright.

15 23. McCain has informed Argent that Argent is liable for alleged
 16 infringement of McCain's Registered Copyright as a result of alleged uses of
 17 certain Photographs by unrelated third parties.

18 24. Argent denies that it has infringed, or is infringing, McCain's
 19 Registered Copyright.

20 25. Argent denies that it is liable for any alleged infringement of McCain's
 21 Registered Copyright resulting from uses of certain Photographs by these unrelated
 22 third parties.

23 26. In the Spring and Summer of 2006, McCain threatened to commence
 24 legal action against Argent. Nevertheless, Argent attempted to resolve the dispute
 25 with McCain amicably. However, no mutually acceptable resolution was reached
 26 between the parties. As a result of the threats of impending litigation, Argent was
 27 faced with the constant uncertainty of costly litigation. There is, therefore, an
 28

1 actual case and controversy between the parties and, as such, this action was
 2 commenced on August 15, 2006.

3 27. On or about December 7, 2006, McCain filed a counter-claim
 4 ("Counterclaim") against Argent and others asserting a claim of copyright
 5 infringement against Argent and other counter-defendants for Argent's alleged
 6 copyright infringement of the Photographs.

7 28. Additionally, notwithstanding the pendency of this action, on June 15,
 8 2007, McCain filed an action entitled *George Edward McCain v. Rahal Letterman*
 9 *Racing, LLC, et al.*, in the United States District Court for the Southern District of
 10 New York, case number 07-CV-5729 (the "New York Action"). The complaint in
 11 the New York Action is, amongst others, against Team Rahal's sister company,
 12 Rahal Letterman Racing, Inc., for copyright infringement of the same Photographs.
 13 A true and correct copy of the New York Action complaint is attached hereto as
 14 **Exhibit A.**

15 **FACTS RELATING TO ARGENT'S CLAIMS AGAINST BORCHETTA**
 16 **FOR BREACH OF FIDUCIARY DUTY AND BORCHETTA'S**
 17 **CONSPIRACY WITH MCCAIN TO DEFRAUD ARGENT**

18 29. On or about May 14, 2002, Borchetta & Wentworth Advertising,
 19 through its president, Mark Borchetta, and Argent entered into an Agency Service
 20 Agreement (the "Agency Agreement"), a true and correct copy of which is attached
 21 hereto as **Exhibit B**. At different times of the relationship between Mark Borchetta
 22 and Argent, Mark Borchetta, at one time or another, performed his agency duties
 23 under the "color" of each of the Borchetta Entities.

24 30. Pursuant to the California Agency Act (California Civil Code Section
 25 2295, *et seq.*), Borchetta, as an agent of Argent, owes Argent the utmost level of
 26 good faith and fidelity and Borchetta's fiduciary duties, as a matter of law, include
 27 without limitation: not acting on behalf of any person or entities whose interests
 28

1 were adverse to Argent's interests; making full disclosures of all material facts that
 2 may impact Argent's interests or its decision-making abilities; not disclosing
 3 confidential information to third parties; and not receiving a kickback for services
 4 that Borchetta provided or arranged for Argent.

5 31. Pursuant to the Agency Agreement, Argent instructed Borchetta to
 6 acquire photographs of Danica Patrick for Argent's exclusive and perpetual use in
 7 its advertising and marketing campaigns. Borchetta was specifically instructed to
 8 obtain full and unlimited rights to such photographs (including copyrights).

9 32. On or about November 13, 2002 Borchetta hired and contracted with
 10 defendant McCain to take the requested photographs (the "First Photography
 11 Agreement"). Attached hereto as **Exhibit C** is a true and correct copy of the First
 12 Photography Agreement.

13 33. Contrary to Argent's express instructions to its purported agent,
 14 Borchetta, the First Photography Agreement did not acquire unlimited rights for
 15 Argent of the Photographs.

16 34. Argent is informed and believes that Borchetta affirmatively
 17 misrepresented to Argent that Argent did, in fact, possess full rights and ownership
 18 of the Photographs pursuant to the First Photography Agreement. Moreover,
 19 despite his duty to do so, Borchetta failed to disclose to Argent any limitations or
 20 restrictions with regard to Argent's use of the Photographs. Finally, Borchetta did
 21 not initially deliver the Photographs to Argent and instead, in a breach of the First
 22 Photography Agreement, delivered them first to Team Rahal—also failing to advise
 23 Team Rahal of the restrictions enumerated in the First Photography Agreement.

24 35. On August 11, 2004, while still acting, under contract, as Argent's
 25 agent and without Argent's knowledge or consent, Borchetta began representing
 26 one of Argent's competitors in connection with the sponsorship of an Indy Racing
 27 event going so far as soliciting potential clients by stating, "I brought Argent
 28 Mortgage into racing with Rahal Letterman – *but there is no specific allegiance or*

1 *conflict there..."* (Emphasis added.) See Borchetta's August 11, 2004 letter,
 2 provided to counsel for Argent by Mark Borchetta, attached hereto as **Exhibit D**.

3 36. On or about November 24, 2004, Argent and Borchetta cancelled the
 4 Agency Agreement and after that, Argent retained Borchetta's services as their
 5 agent on a project by project basis.

6 37. On or about January 21, 2005, Argent rehired Borchetta as its agent to
 7 acquire a Photography agreement from McCain for use of certain Photographs in
 8 various third party publications. Attached hereto as **Exhibit E** is a true and correct
 9 copy of the Second Photography Agreement.

10 38. Pursuant to the Second Photography Agreement, Borchetta was again
 11 authorized and engaged to act as Argent's agent to acquire these photographs at the
 12 best possible price. In an email dated February 7, 2005, Borchetta advised Argent
 13 that he obtained the photographs at the "discounted rate of \$6,500." (See Borchetta
 14 email attached hereto as **Exhibit F**.) However, Borchetta misrepresented this fact
 15 to Argent and omitted to fully disclose the nature of his relationship to McCain.

16 39. On or about January 20, 2005, McCain advised Borchetta that the cost
 17 of the Second Photography Agreement would be \$5,970. Borchetta, however,
 18 emailed McCain and advised him that Argent "ha[s] the money and they are very
 19 difficult to deal with..." and that McCain should invoice Argent the higher price of
 20 \$6,500. (See Borchetta email attached hereto as **Exhibit G**).

21 40. Finally, Borchetta and McCain agreed that McCain would invoice
 22 Argent \$6,500 and pay Borchetta the difference between the \$6,500 and the \$5,970
 23 without Argent's knowledge or consent (see email exchange between Borchetta and
 24 McCain **Exhibit H**).

25 41. Later, after McCain began questioning the allegedly unauthorized use
 26 of the Photographs by parties unrelated to Argent, Borchetta forwarded certain
 27 confidential communications between himself and Argent (that took place when he
 28 was Argent's agent) to McCain without Argent's knowledge or consent. Argent is

1 informed and believes that some time prior to June 2, 2005 Borchetta and McCain
2 entered into an unlawful conspiracy to extort Argent in connection with the alleged
3 infringement of the Photographs. Specifically, it appears that McCain and
4 Borchetta agreed that Borchetta would be paid ten percent of any monies paid by
5 Argent to McCain through their “shakedown” of Argent. Borchetta, despite having
6 continuing duties to Argent and despite having an apparent and unquestionable
7 conflict of interest, assisted McCain in his extortion attempts to shakedown Argent.
8 Attached hereto as **Exhibit I** is a copy of an e-mail from McCain to Borchetta
9 discussing this conspiracy and payment arrangement.

10 42. Finally, in later communications with Argent regarding the use of the
11 Photographs, Borchetta routinely blind copied McCain on emails that Argent
12 believed were confidential communications between itself and its agent. Argent is
13 informed and believes that the purpose of these blind communications was an
14 attempt by Borchetta and McCain to further entrap Argent and extort monies from
15 Argent for the alleged infringement of the Photographs.

FIRST CLAIM FOR RELIEF

Declaratory Judgment of Non-Infringement of Copyright

(Against McCain)

19 43. Argent realleges and incorporates herein, by reference, each of the
20 allegations in paragraphs 1-12 and 17-28 of this Complaint as if set forth in full.

21 44. Argent's uses of the Photographs do not infringe McCain's Registered
22 Copyright. Therefore, Argent is entitled to a declaratory judgment of Argent's
23 rights, specifically, that Argent has not infringed McCain's Registered Copyright.

SECOND CLAIM FOR RELIEF

Declaratory Judgment of No Liability for Alleged Infringement by Third Parties
(Against McCain)

45. Argent realleges and incorporates herein, by reference, each of the allegations in paragraphs 1-12, 17-28 and 44 of this Complaint as if set forth in full.

46. Argent did not authorize any third parties to use the Photographs and is not responsible for any such use of the Photographs.

47. Argent is not liable for any alleged infringement of McCain's Registered Copyright by third parties. Therefore, Argent is entitled to a declaratory judgment against McCain that Argent is not liable for any alleged infringement of McCain's Registered Copyright by third parties.

THIRD CLAIM FOR RELIEF

Breach of Written Contract

(Against Borchetta)

48. Argent realleges and incorporates herein, by reference, each of the allegations in paragraphs 1-42 of this Complaint as if set forth in full.

49. On or about May 14, 2002, Borchetta and Argent entered into the written Agency Agreement. Although the Agency Agreement was entered into between Argent and Borchetta & Wentworth Advertising, Borchetta & Wentworth Advertising is a form of business entity which is unknown and, on information and belief, is an alter ego of Mark Borchetta and/or the Borchetta Entities. The uncertainty as to which Borchetta Entity entered into the Agency Agreement with Argent is illustrated by the fact that the Agency Agreement is written on The Creative Department letterhead although it was executed by Mark Borchetta allegedly on behalf of Borchetta & Wentworth Advertising.

50. Pursuant to paragraph II.B. of the Agency Agreement, Borchetta agreed to, among other things, devote his (or their) best efforts to advance Argent's

1 interests, including: (a) Obtaining full rights to and ownership of the Photographs in
2 favor of Argent; (b) Fully disclosing the terms of all contracts, including those with
3 McCain, which were negotiated and contracted for within the scope of the agency
4 relationship with Argent; and (c) Not divulging any proprietary information,
5 including reports, marketing information or materials, supplied by Argent without
6 Argent's prior permission.

7 51. Borchetta breached the Agency Agreement by, among other things:
8 (a) failing to obtain full rights to and ownership of the Photographs as instructed by
9 Argent and thereby failing to act in Argent's best interests; (b) failing to fully
10 disclose to Argent the limitations of use to the Photographs under the First
11 Photography Agreement; (c) wrongfully divulging Argent's proprietary and
12 confidential information to third parties without Argent's consent; and (d) failed to
13 disclose to Argent the terms of Borchetta's kickback agreement with McCain.

14 52. Argent performed all conditions, covenants, and promises required to
15 be performed by Argent in accordance with the terms of the Agency Agreement,
16 except for those waived or excused by Borchetta.

17 53. As a direct and proximate result of Borchetta's breach of the Agency
18 Agreement, Argent has suffered injury in an amount to be proven at trial, but
19 reasonably believed to be in excess of the jurisdictional limitation of this Court,
20 including recovery of attorneys' fees and costs.

FOURTH CLAIM FOR RELIEF

Breach of Fiduciary Duty

(Against Borchetta)

24 54. Argent realleges and incorporates herein by reference, each of the
25 allegations in paragraphs 1-42 and 49-53 of this Complaint as if set forth in full.

1 55. On or about May 14, 2002, Borchetta and Argent entered into the
 2 Agency Agreement. As specifically enumerated in paragraph 30, above, Borchetta
 3 owed to Argent the utmost level of good faith and fidelity.

4 56. On information and belief, Argent alleges that Borchetta breached his
 5 (or their) fiduciary duties to Argent and failed to act as a reasonably careful agent
 6 would have acted under the same or similar circumstances. Borchetta acted
 7 adversely to Argent's interests and without Argent's knowledge or consent by,
 8 among other things: (a) failing to obtain the full rights to the Photographs for
 9 Argent and failing to fully disclose the limitations in the Photography Agreements
 10 to Argent; (b) revealing, in and around January 2005, Argent's confidential
 11 marketing strategy and budget to McCain; (c) blind copying McCain on e-mails
 12 from Borchetta to Argent without informing Argent at anytime that their private
 13 and confidential communications were being disclosed to outside parties while
 14 Borchetta and Argent were communicating; (d) forwarding private and confidential
 15 communications between Borchetta and Argent to McCain without obtaining
 16 Argent's consent for such disclosure or informing Argent of the disclosure at any
 17 time; (e) entering into an agreement with McCain whereby McCain would
 18 overcharge Argent for the Second Photography Agreement and then kickback a
 19 portion of Argent's payment to Borchetta; and (f) agreeing to accept money from
 20 McCain in exchange for Borchetta's assistance in McCain's claim of copyright
 21 infringement against Argent.

22 57. Borchetta used his (or their) knowledge of confidential information
 23 acquired during the agency relationship with Argent and shared the confidential
 24 information with McCain to bolster McCain's adverse position to Argent and to
 25 personally profit from such unauthorized disclosure.

26 58. As a direct and proximate result of Borchetta's breach of fiduciary
 27 duties to Argent, Argent has suffered injury in an amount to be proven at trial, but
 28

1 reasonably believed to be in excess of the jurisdictional limitation of this Court,
2 including recovery of attorneys' fees and costs.

3 59. The aforementioned acts of Borchetta were willful, malicious and
4 oppressive and justify an award of punitive damages in an amount sufficient to
5 punish Borchetta and to deter future conduct of this type.

FIFTH CLAIM FOR RELIEF

Contractual Indemnity

(Against Borchetta)

9 60. Argent realleges and incorporates herein by reference, each of the
10 allegations in paragraphs 1-59 of this Complaint as if set forth in full.

11 61. Paragraph VIII of the Agency Agreement provides that Borchetta is
12 required to indemnify Argent from any liability, loss, cost, expense or obligation
13 (including attorneys' fees and costs) on account of or arising from the Agency
14 Agreement.

15 62. Defendant McCain has asserted that Argent is liable for alleged
16 copyright infringement of the Photographs.

17 63. As between Argent and Borchetta, responsibility for the alleged
18 copyright infringement of the Photographs rests entirely, or at least partially, on
19 Borchetta.

20 64. If Argent is found liable for copyright infringement, any damages for
21 which Argent may be held liable to McCain will be the result of Borchetta's
22 breaches of contract, breaches of fiduciary duties owed to Argent, and fraudulent
23 conduct and, as such, Argent is entitled to be fully, or at least partially, indemnified
24 for all damages for which Argent is found liable to McCain, as well as for Argent's
25 attorneys' fees and costs.

SIXTH CLAIM FOR RELIEF**Equitable Indemnity****(Against Borchetta)**

65. Argent realleges and incorporates herein by reference, each of the allegations in paragraphs 1-64 of this Complaint as if set forth in full.

66. McCain has asserted that Argent is liable for alleged copyright infringement of the Photographs.

67. As between Argent and Borchetta, responsibility for the alleged copyright infringement of the Photographs rests entirely, or at least partially, with Borchetta.

68. If Argent is found liable for copyright infringement, any damages for which Argent may be held liable to McCain will be the direct result of Borchetta's breaches of contract, breaches of fiduciary duties owed to Argent, and fraudulent conduct and, as such, Argent is entitled to be fully, or at least partially, equitably indemnified from Borchetta for all damages for which Argent is found liable to McCain, as well as for attorneys' fees and costs.

SEVENTH CLAIM FOR RELIEF**Accounting****(Against Borchetta)**

69. Argent realleges and incorporates herein by reference, each of the allegations in paragraphs 1-68 of this Complaint as if set forth in full.

70. As an agent owing fiduciary duties to Argent, Borchetta is required to account for all benefits and advantages Borchetta received which arose from or were related to the agency relationship.

71. Argent is informed and believes that, while Borchetta was supposedly acting in the covenant between Argent and Borchetta, Borchetta obtained monies or other benefits from persons or entities other than Argent for performing duties

1 contrary to the interests of Argent, in breach of Borchetta's fiduciary duties to
2 Argent.

3 72. Argent is entitled to an accounting to determine what monies or other
4 benefits Borchetta received from any person or entity which arose from the agency
5 relationship between Argent and Borchetta.

EIGHTH CLAIM FOR RELIEF

Fraud – Intentional Misrepresentation

(Against Borchetta)

9 73. Argent realleges and incorporates herein by reference, each of the
10 allegations in paragraphs 1-72 of this Complaint as if set forth in full.

11 74. On information and belief, before entering into the First Photography
12 Agreement, Borchetta represented to Argent that Argent would have unlimited
13 rights to the Photographs. These representations by Borchetta to Argent were false
14 and were known by Borchetta to be false at the time Borchetta made these
15 representations to Argent.

16 75. Borchetta made these representations with the intent to deceive Argent
17 and Borchetta recklessly made the representations without regard for the truth.

18 76. Borchetta intended that Argent would justifiably rely on these
19 representations.

20 77. At the time the representations were made, Argent did not know that
21 the misrepresentations were false and therefore relied on Borchetta's
22 representations that Argent owned full rights to the Photographs Borchetta was
23 charged with obtaining these rights.

24 78. Argent was justified in its reliance on Borchetta's misrepresentations
25 as Borchetta was acting as Argent's agent and Argent trusted Borchetta in that
26 capacity.

1 79. As a direct and proximate result of Borchetta's intentional
2 misrepresentations, Argent has suffered injury in an amount to be proven at trial,
3 but reasonably believed to be in excess of the jurisdictional limitation of this Court,
4 including recovery of attorneys' fees and costs.

5 80. The aforementioned acts of Borchetta were willful, malicious and
6 oppressive and justify an award of punitive damages in an amount sufficient to
7 punish said defendants and to deter future conduct of this type.

NINTH CLAIM FOR RELIEF

Fraud - Intentional Concealment

(Against Borchetta)

1 81. Argent realleges and incorporates herein by reference, each of the
2 allegations in paragraphs 1-80 of this Complaint as if set forth in full.

3 82. On information and belief, before entering into the First Photography
4 Agreement, Argent told Borchetta that Argent intended to and desired to have
5 unlimited rights to the Photographs.

6 83. Thereafter, Borchetta intentionally failed to disclose and/or actively
7 concealed from Argent the material terms and limitations of the First Photography
8 Agreement with respect to Argent's use of the Photographs or the terms of
9 Borchetta's relationship with McCain. Borchetta knew or reasonably should have
0 known that Argent would justifiably rely on Borchetta fully disclosing all material
1 facts to Argent concerning its rights under the Photography Agreements.

84. Borchetta never advised Argent that he (or they) had agreed to limit Argent's rights to the Photographs and thus, Argent reasonably believed that it owned full rights to the Photographs.

85. Argent was justified in its reliance on Borchetta with respect to Argent's use of the Photographs as Borchetta was acting as Argent's agent.

1 86. As a direct and proximate result of Borchetta's fraudulent
2 concealment, Argent has suffered injury in an amount to be proven at trial, but
3 reasonably believed to be in excess of the jurisdictional limitation of this Court,
4 including recovery of attorneys' fees and costs.

5 87. The aforementioned acts of Borchetta were willful, malicious and
6 oppressive and justify an award of punitive damages in an amount sufficient to
7 punish said defendants and to deter future conduct of this type.

TENTH CLAIM FOR RELIEF

Fraud – Intentional Concealment of Secret Profits

(Against Borchetta and McCain)

11 88. Argent realleges and incorporates herein by reference, each of the
12 allegations in paragraphs 1-87 of this Complaint as if set forth in full.

13 89. On or about January 21, 2005, Borchetta and McCain knowingly and
14 willfully agreed among themselves that, pursuant to the Second Photography
15 Agreement, McCain would directly invoice Argent for his photography services but
16 would charge Argent more than his regular fee and would then kickback to
17 Borchetta the difference between McCain's fees and what Argent paid to McCain.

18 90. McCain and Borchetta intentionally and purposely failed to disclose
19 and/or actively concealed from Argent this secret kickback arrangement in order for
20 Borchetta to be paid this extra money.

21 91. Borchetta and McCain knew or reasonably should have known that
22 Argent would justifiably rely on Borchetta fully disclosing all material facts to it
23 concerning Argent's payments to McCain for the Photographs it obtained under the
24 Second Photography Agreement.

25 92. Argent was justified in its reliance on Borchetta and McCain's silence
26 with respect to the unlawful payment to Borchetta through Borchetta's and
27 McCain's fraudulent concealment.

1 93. As a direct and proximate result of the defendants' fraudulent
 2 concealment, Argent has suffered injury in an amount to be proven at trial, but
 3 reasonably believed to be in excess of the jurisdictional limitation of this Court,
 4 including recovery of attorneys' fees and costs.

5 94. The aforementioned acts of the defendants, and each of them, were
 6 willful, malicious and oppressive and justify an award of punitive damages in an
 7 amount sufficient to punish said defendants and to deter future conduct of this type.

8 **ELEVENTH CLAIM FOR RELIEF**

9 **Conspiracy**

10 (Against Borchetta and McCain)

11 95. Argent realleges and incorporates herein by reference, each of the
 12 allegations in paragraphs 1-94 of this Complaint as if set forth in full.

13 96. On or about January 21, 2005, Borchetta and McCain knowingly and
 14 willfully conspired and agreed among themselves that, pursuant to the Second
 15 Photography Agreement, McCain would directly invoice Argent for his
 16 photography services but would charge Argent more than his regular fee and would
 17 then kickback to Borchetta the difference between McCain's fees and what Argent
 18 paid to McCain.

19 97. McCain and Borchetta intentionally failed to disclose or actively
 20 concealed from Argent this secret arrangement from Argent in order for Borchetta
 21 to be paid twice from Argent: one payment directly from Argent for Borchetta's
 22 services as Argent's agent and fiduciary; and then another payment as a kickback
 23 from McCain once Argent directly paid McCain for his photography services.

24 98. Borchetta and McCain knew or reasonably should have known that
 25 Argent would justifiably rely on Borchetta fully disclosing all material facts to it
 26 concerning Argent's payments to McCain for the Photographs it obtained under the
 27 Second Photography Agreement. Additionally, McCain and Borchetta conspired to
 28

1 extort money from Argent by attempting to get Argent to pay money for the alleged
 2 infringement of the Photographs despite the fact that such Photographs were in the
 3 control of Borchetta. In exchange for his cooperation, McCain promised to pay
 4 Borchetta ten percent of any monies extorted from Argent (see **Exhibit I**).

5 99. Argent was justified in its reliance on Borchetta's and McCain's
 6 silence with respect to Argent's double payment to Borchetta through Borchetta's
 7 and McCain's fraudulent concealment.

8 100. As a direct and proximate result of the defendants' conspiracy to
 9 fraudulently conceal their arrangement for secret profits, Argent has suffered injury
 10 in an amount to be proven at trial, but reasonably believed to be in excess of the
 11 jurisdictional limitation of this Court, including recovery of attorneys' fees and
 12 costs.

13 101. The aforementioned acts of the defendants, and each of them, were
 14 willful, malicious and oppressive and justify an award of punitive damages in an
 15 amount sufficient to punish said defendants and to deter future conduct of this type.

16 **PRAYER FOR RELIEF**

17 WHEREFORE Argent prays for judgment as follows:

18 **On The First Claim For Relief**

19 (Declaratory Judgment of Non-Infringement)

20 1. A declaration that Argent's use of the Photographs, which McCain
 21 contends is an infringement of McCain's copyrights, do not constitute infringement
 22 of McCain's Registered Copyright pursuant to 17 U.S.C. § 501 or a violation of any
 23 other rights held by McCain;

24

25

26

27

28

On The Second Claim For Relief

(Declaratory Judgment of No Liability for Alleged Infringement by Third Parties)

2. A declaration that Argent is not liable for any uses of Photographs by third parties, which McCain alleges are an infringement of McCain's Registered Copyright;

On The Third Claim For Relief

(Breach of Written Contract)

3. For damages in an amount to be determined at trial;

4. For interest at the legal rate;

5. For reasonable attorneys' fees;

On The Fourth Claim For Relief

(Breach of Fiduciary Duty)

6. For damages in an amount to be determined at trial;

7. For recovery of any secret profits wrongfully obtained during the
y relationship between the Borchetta Defendants and Argent;

8. For interest at the legal rate;

9. For punitive damages;

10. For reasonable attorneys' fee

On The Fifth Claim For Relief

(Contractual Indemnity)

11. If Argent is found liable for damages arising from McCain's claim of copyright infringement, for Argent to be fully or partially indemnified for all damages based on the indemnification provision in the Agency Agreement;

12. For reasonable attorneys' fees;

On The Sixth Claim For Relief
(Equitable Indemnity)

13. If Argent is found liable for damages arising from McCain's claim of copyright infringement, for Argent to be fully or partially indemnified for all damages based on equitable principles;

6 14. For reasonable attorneys' fees;

On The Seventh Claim For Relief
(Accounting)

15. For an accounting of all monies due and owing from defendants to Argent;

16. For an order granting possession of the above-described monies to Argent;

On The Eighth Claim For Relief

17. For damages in an amount to be determined at trial;
18. For interest at the legal rate;
19. For punitive damages;
20. For reasonable attorneys' fees;

On The Ninth Claim For Relief
(Fraud – Intentional Concealment)

21 21. For damages in an amount to be determined at trial;
22 22. For interest at the legal rate;
23 23. For punitive damages;
24 24. For reasonable attorneys' fees;

On The Tenth Claim For Relief

27 25. For damages in an amount to be determined at trial;
28 26. For interest at the legal rate:

- 1 27. For punitive damages;
- 2 28. For reasonable attorneys' fees;

3 On The Eleventh Claim For Relief

4 (Fraud – Conspiracy)

- 5 29. For damages in an amount to be determined at trial;
- 6 30. For interest at the legal rate;
- 7 31. For punitive damages;
- 8 32. For reasonable attorneys' fees;

9 On All Claims For Relief

- 10 33. For interest at the legal rate on all sums recovered;
- 11 34. For attorneys fees, where allowed;
- 12 35. For costs of suit; and
- 13 36. For such other and further relief as the Court may deem proper.

14 DATED: July ____, 2007

15 BUCHALTER NEMER
16 A Professional Corporation

17 By: _____

18 RICHARD P. ORMOND
19 Attorneys for Plaintiff and Counterclaim
20 Defendant Argent Mortgage Company, LLC

DEMAND FOR JURY TRIAL

Pursuant to F.R.C.P. 38(b), Argent hereby demands a trial by jury in this action of any issues triable by jury.

DATED: July , 2007

BUCHALTER NEMER
A Professional Corporation

By:

RICHARD P. ORMOND
Attorneys for Plaintiff and Counterclaim
Defendant Argent Mortgage Company, LLC

PROOF OF SERVICE**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1875 Century Park East, Suite 2200, Los Angeles, California 90067-2523.

On **July 27, 2007**, I served the foregoing document described as **AFFIRMATION OF JOHN W. PATTON, JR.** on all interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

- BY MAIL:** I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.
- BY FACSIMILE:** At or before 5:00 p.m., I caused said document(s) to be transmitted by facsimile. The telephone number of the sending facsimile machine was (310) 553-1540. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The document was transmitted by facsimile transmission, and the sending facsimile machine properly issued a transmission report confirming that the transmission was complete and without error.
- BY FEDEX:** I deposited such document(s) in a box or other facility regularly maintained by FedEx, or delivered such document(s) to a courier or driver authorized by FedEx to receive documents, in an envelope or package designated by FedEx with delivery fees paid or provided for, addressed to the person(s) being served.
- BY PERSONAL SERVICE:** I delivered such envelope(s) by hand to the office of the person(s) being served.
- BY PERSONAL SERVICE:** I personally delivered such envelope(s) directly to the person(s) being served.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 27, 2007, at Los Angeles, California.



L. K. Snyder

George Edward McCain v. Rahal Letterman Racing, LLC, etc., et al.
United States District Court Southern District of New York
Case No. 07-CV-5729 (JSR)

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